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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76—1114, 76—1139 and 76—1587

CALIFORNIA, *ET AL.*,

Petitioners

v.

SOUTHLAND ROYALTY COMPANY, *ET AL.*

Respondents

On Writ Of Certiorari To The United States Court of Appeals For the Fifth Circuit

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MOTION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND AMICUS BRIEF FOR THE PUBLIC SERVICE COMMISSION

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MOTION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Public Service Commission of the State of New York (New York) herewith moves the Court, pursuant to Rule 42, for permission to file the attached brief, *amicus curiae*.

The Public Service Commission of the State of New York is a regulatory body established under the laws of New York State having responsibility *inter alia* over the sale of natural gas at retail within the state. Since the great bulk of the gas sold at retail by the New York gas distribution companies subject to its

authority is purchased from the interstate pipelines subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U.S.C., Section 717 *et esq.*, New York is of necessity vitally interested in the scope of the Federal Power Commission's authority over both the interstate pipelines and the sales of gas to such pipelines by producers of natural gas.

The Court of Appeals opinion under review in these cases would permit lessor-royalty holders to withdraw substantial quantities of gas at the terminal date of the lease, from the service being provided by producers to the interstate pipelines, and by the latter to their distribution company customers, without the necessity of seeking abandonment authority from the Commission under Section 7(b) of the Natural Gas Act. The rationale of the lower court's opinion has far greater implications, both with respect to the maintenance of adequate gas supplies by the interstate pipelines in a period in which many pipelines are already unable to meet the firm requirements of their customers, and with respect to the price of such gas.

While we would expect that many of the matters covered by New York's *amicus* brief will be addressed in the briefs of the petitioners, New York is seeking leave to file the attached brief to set forth New York's views on the important issues presented in this proceeding, including the relationship of the lower court's opinion to previous court determinations that the royalty interests of a lessor normally do not convert the lease transaction into a jurisdictional sale of the gas subject to the regulatory authority of the Federal Power Commission. This motion has been necessitated by our inability to secure the consent of all of the respondents to the filing of an *amicus* brief.

Accordingly, the Public Service Commission of the State of New York requests the Court to authorize the filing of the attached brief *amicus curiae* in these proceedings.

Respectfully submitted,

Public Service Commission of the
State of New York

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August 31, 1977

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BRIEF FOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *AMICUS CURIAE*

The Public Service Commission of the State of New York (New York) herewith files its brief, *amicus curiae* in support of the position of the petitioners in these cases that termination of a lease under which a producer has sold gas in interstate commerce for resale, pursuant to an unlimited certificate issued by the Federal Power Commission, does not authorize the lessor to withdraw the gas from the interstate market unless and until

abandonment authority is secured from the Commission pursuant to Section 7(b) of the Natural Gas Act, 15 U.S.C., Section 717f(b).

The Interest of the Amicus

The Public Service Commission of the State of New York is a regulatory agency established by the laws of New York State having jurisdiction *inter alia* over the service and rates of distribution companies selling natural gas at retail within the state. As such it is directly concerned with the operations of the Federal Power Commission under the Natural Gas Act, 15 U.S.C. §717, *et seq.*, relating to the sale of natural gas by producers to the interstate pipelines from whom New York distributors secure the bulk of their gas supplies, as well as over the interstate pipelines themselves. Prominent among such interests, particularly at a time when many of the pipelines serving New York distributors are not in a position to meet their firm obligations and have had to curtail service, is the Commission's responsibility under Section 7(b) of the Natural Gas Act. New York is thus directly interested in the decision of the court of appeals in issue in this proceeding, *Southland Royalty Co. v. Federal Power Commission*, 543 F. 2d 1134 (C.A. 5), which, if permitted to stand, could have the effect of withdrawing from the interstate pipelines, including those directly or indirectly serving New York, substantial volumes of gas upon which they depend to maintain their current levels of gas service.[1]

Argument

The principal issue in this proceeding, as New York sees it, is whether the provisions of Section 7(b) of the Natural Gas Act

[1]The gas involved in the instant proceedings has been sold to pipelines which do not serve New York, and New York, though a frequent participant in Commission proceedings, did not intervene in the cases before the Commission or in the lower court. The opinion below, if permitted to stand, would, however, have direct and immediate implications on existing service to New York customers.

protecting gas consumers from abandonment of service not consistent with the public interest, which normally supersede all private contractual provisions to the contrary,[2] can be thwarted where the person claiming private contractual rights to divert gas flowing in interstate commerce pursuant to outstanding Commission certificates is a lessor-royalty owner rather than the producer-seller himself. New York is convinced that the answer to this question can and must be in the negative.

While the case arises in context of a claim by the holders of reversionary interests in expired leases, the Court of Appeals rationale is not and, we are afraid, could not be so limited. The Court expressly bulwarked its decision by reference to a Commission opinion, since repudiated, which dealt with the right of a royalty owner to exercise contractual rights to convert his interest into a working interest and divert the gas to different uses, without first securing abandonment authority from the Federal Power Commission pursuant to the provisions of Section 7(b) of the Natural Gas Act.[3] As the petitioners have pointed out, there are numerous other situations pending before the Commission presenting variants of the issue of a lessor's contractual rights to remove gas from certificated service upon the happening of particular events of which lessor may disapprove. Not the least important to these, in the light of

[2]See *Sunray Mid-Continent Oil v. Federal Power Commission*, 364 U.S. 137; *Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170; *United Gas Pipe Line Co. v. Federal Power Commission*, 385 U.S. 83; *Hunt v. Federal Power Commission*, 306 F. 2d 334 342 (C.A. 5); *Mitchell Energy Corp. v. Federal Power Commission*, 533 F. 2d 258 (C.A. 5); See also *Atlantic Refining Co. v. Public Service Commission of New York, (CATCO)*, 360 U.S. 378; *cf., Transcontinental Gas Pipe Line Corp. v. Federal Power Commission*, 488 F. 2d 1355 (C.A.D.C.) certiorari denied, 417 U.S. 921.

[3]*El Paso Natural Gas Co. v. Perry R. Bass.*, 48 F.P.C. 1269 (1972), overruled *Phillips Petroleum Co.* Opinion No. 750, ____ F.P.C. ____ Docket No. C176-48 (issued January 28, 1976), affirmed *Phillips Petroleum Co. v. Federal Power Commission*, 556 F. 2d 466 (C.A. 10). While this latter opinion purports to distinguish the Fifth Circuit's opinion in the present case, the basis for the distinction was expressly rejected by the court below. See *Southland Royalty Co. v. Federal Power Commission*, 543 F. 2d 1134 at 1138.

pending legislation to bring all new intrastate gas sales under federal regulaton,[4] are the common lease provisions providing for termination of a lease if any sale therefrom becomes subject to regulation affecting the price at which the gas can be sold.

The courts have held that under normal conditions a lessor-royalty owner does not make or participate in a sale in interstate commerce under the Natural Gas Act because, unlike the situation presented by the "lease sale" involved in the *Rayne Field* case, *United Gas Improvement Co. v. Continental Oil Co.* 381 U.S. 392, such royalty owner typically "has no control over any incident of such sale either as to the quantity to be sold, the price to be paid, the identity of the purchaser or whether it shall be sold in interstate or intrastate commerce" *Mobil Oil Corporation v. Federal Power Commission* 463 F. 2d 256, 262 (C.A.D.C.), certiorari denied, 406 U.S. 976 (1972). The court made clear, however, that where the lessor in fact exercises some of these normal indicia of a sale it might well qualify as a natural gas company making a sale in interstate commerce. See 463 F. 2d at 266. Obviously, the right to terminate an ongoing sale is at least as important under the regulatory scheme as the right to control the terms of the initial dedication of the gas to interstate commerce. A serious question thus exists as whether a royalty owner able to exercise such right would not by that action be converting his royalty interest into that of a participant in the sale made by the producer, who of course is compelled to maintain service.

However, the case before the Court does not, in our view, require resolution of this issue. For as this Court conclusively determined in *Sunray Mid-Continent Oil Company v. Federal Power Commission* 364 U.S. 137, (1960), the obligations imposed by Congress under Section 7(b) of the Natural Gas Act to maintain certificated service unless and until the Commission finds that the available supply of gas is depleted or present or future public convenience or necessity permit its abandonment, apply to services initiated by a producer of natural gas as well as

[4]See H.R. 8444, 95th Cong., 1st Sess., approved by the House of Representatives, August 5, 1977, Sections 402(5), 404-406.

to service by pipelines to local gas distributors. There is nothing in the Natural Gas Act or in the Congressional rationale underlying Section 7(b) to suggest that this Congressionally-mandated protection of gas consumers from inopportune service disruption is any less applicable where the private contractual rights with which it interferes are those of a lessor-royalty owner rather than those of the producer lessee. In either case the exercise of the paramount federal authority supersedes private rights to a different course of action.

Under some circumstances the lessor conceivably might have a cause of action in damages against the lessee—though in the present situations it would not appear that the producers have taken any actions in derogation of their lease responsibilities. And the termination of the lease places the lessors or their successors in the position of alternatively being able to seek abandonment authority from the Commission, or to seek any higher available rates for continued service, free of contractual limitations.[5] What they cannot do as lessors any more than as producers is unilaterally to divert available gas supplies and the continuing jurisdictional service dependent thereon, from the interstate pipelines to whom the gas had previously been dedicated under unlimited-term certificates.

[5]Under the Commission's governing rate structure, recently approved in *American Public Gas Association v. Federal Power Commission*, F. 2d _____ (C.A.D.C., Case Nos. 76-2000, *et al.*, decided June 16, 1977),when a producer and pipeline enter into a new contract after an initial sales contract is no longer in force, the permissible maximum rate for such sales may increase from 29.5 cents per mcf, plus annual one-cent escalations, to 52.0 cents, plus similar escalations. Thus, if the opinion of the Court of Appeals is correct, the lessor upon entering into a new contract to continue to sell the gas to the pipeline previously receiving the gas at the 29.5 cent base rate would be automatically entitled to the higher rate..

CONCLUSION

For the reasons set forth herein, the opinion below is erroneous and the case must be remanded with instructions to affirm the Commission order in issue.

Respectfully submitted.

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